businesses from the expense of Title VII compliance. A jurisdictional approach, on the other hand, would both further this Congressional intent of small business protection and has not and would not hamper the effective administration of Title VII.

II. THIS COURT HAS CONSISTENTLY ADDRESSED THE NUMEROSITY REQUIREMENT OF §701(b) IN JURISDICTIONAL TERMS.

While this Court has not had the occasion to directly answer the question presented by petitioner, it has commented upon §701(b) in at least four cases. In each of these matters, the Court has made clear that numerosity is not "merely one of several elements of the merits of a Title VII claim" as suggested by petitioner. Arbaugh Br. 12. Rather, §701(b)'s requirement that a business have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year is a fundamental requirement without which Title VII has no application.

This Court most recently addressed the numerosity requirement contained in §701(b) in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1998). In *Walters*, the district court had dismissed a Title VII action for lack of subject matter jurisdiction upon the defendants' motion which contended that the defendant company did not employ fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year as required by §701(b). This Court granted a writ of certiorari directed to the Seventh Circuit Court of Appeals which had affirmed the district court's dismissal.

While the main issue which this Court addressed in *Walters* was whether an employer "has" an employee on days that the employee is employed but not working, the Court's language in discussing the significance of §701(b) is revealing. The opinion starts with the observation that "Title VII of the Civil Rights Act of 1964 **applies to** any employer who 'has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.'" *Id.* at 204 (emphasis added). Later, the Court noted that the defendant therein was "**subject to Title VII**, however, only if, at the time of the alleged retaliation, it met the statutory definition of 'employer' . . . " *Id.* at 205 (emphasis added). Still further in the opinion, the Court rejected the defendant company's proposed method of determining whether an employer "has" an employee on a given day, stating: "On the other hand, Metropolitan's approach produces unique peculiarities of its own: A company that has 15 employees working for it on each day of a 5-day workweek **is covered**, but if it decides to add Saturday to its workweek with only one less than its full complement of employees, **it will become exempt from coverage** . . . " *Id.* at 210 (emphasis added).

Also revealing of this Court's acceptance of the jurisdictional nature of the numerosity requirement is the manner in which this Court remanded *Walters*. After concluding that the district court and the Seventh Circuit had used an improper method to calculate the number of weeks for which the defendant company satisfied the fifteen employee threshold, this Court examined the record and determined that the defendant company was an "employer" within the meaning of §701(b). *Id.* at 212. If, as petitioner contends, §701(b)'s requirement of fifteen employees

was part of a Title VII plaintiff's claim on the merits rather than an element of subject matter jurisdiction, this Court would not have determined that the defendant company in *Walters* was an "employer" given that the plaintiff in *Walters* had not filed a motion for summary judgment on that issue. Rather, this Court would have remanded the matter with instructions that the trier of fact determine the numerosity issue and thus the defendant company's employer status based upon the methodology delineated in this Court's opinion. Given that this Court preempted such an examination and instead determined the employer status of the defendant company in *Walters*, one can conclude that this Court viewed the issue as one of subject matter jurisdiction and thus, appropriate for judicial, rather than jury, determination.

In its amicus brief, the United States discounts the significance of this Court's determination of the numerosity issue in *Walters*, contending that "the parties to that case had apparently stipulated to all relevant facts, leaving no factual disputes for a trier-of-fact to resolve on remand, regardless of whether the question was jurisdictional." U.S. Br. 27. The Government's explanation fails to account for the real impact of this Court's decision upon the parties in *Walters*. Certainly when Metropolitan Educational Enterprises, Inc. filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction in *Walters*, it could not have expected that the result of its motion would have been that an element of the merits of plaintiff's claim would be conclusively established. If, however, as the United States argues, employer status under §701(b) is an element of a Title VII plaintiff's claim on the merits, that is precisely what happened when this Court declared that Metropolitan Educational Enterprises, Inc. was an employer.

In *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (hereinafter "*Aramco*") this Court was called upon to decide whether Title VII applies extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad. As with *Walters*, *Aramco* came before this Court following a district court dismissal of the Title VII claim for lack of subject matter jurisdiction. Also, as with *Walters*, the language of the Court is revealing. First, the Court noted that the petitioners (one of which was the EEOC) argued "that the statute's definitions of the **jurisdictional terms 'employer'** and 'commerce' are sufficiently broad to include U.S. firms that employ American citizens overseas." *Aramco*, *id.* at 248-249 (emphasis added). Further, the Court observed that "[a]n employer **is subject to Title VII** if it has employed 15 or more employees for a specified period . . . " *Aramco*, *id.* at 249 (emphasis added).

The United States downplays the significance of these references contending that this Court was referring to legislative jurisdiction rather than the subject matter jurisdiction of courts, citing Justice Scalia's dissent in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993). This contention is unsupportable, however, given Justice Scalia's definition of "legislative jurisdiction" in *Hartford* and the question presented in *Aramco*. In *Hartford*, Justice Scalia defined "legislative jurisdiction" as "the authority of a state to make its laws applicable to persons or activities." *Hartford*, *id.* at 813. In *Aramco*, the Court observed:

> Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Whether Congress has in fact exercised

> that authority in this case is a matter of statutory construction. It is our task to determine whether Congress intended the protection of Title VII to apply to United States citizens employed by American employers outside of the United States.

Aramco, id. at 248 (citations omitted). As the authority of Congress was not in question in *Aramco*, this Court would have had no reason to discuss jurisdiction in legislative rather than judicial terms when discussing the scope of Title VII. Rather, by defining its task as determining Congressional intent to extend the protection of Title VII reveals analysis of judicial subject matter jurisdiction.

In *EEOC v. Commercial Office Products Company*, 486 U.S. 107 (1988), this Court addressed questions regarding the time limits for filing charges of employment discrimination with the EEOC and the impact of a state agency's decision to waive its exclusive 60-day period for initial processing of a discrimination charge pursuant to a worksharing agreement with the EEOC. In the course of doing so, a plurality of this Court observed:

> Reactivation of state proceedings after the conclusion of federal proceedings serves the useful function of permitting States to enforce their discrimination laws when these laws are more protective than Title VII. **For example, Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees or against bona fide private membership clubs, §701(b), 42 U.S.C. §2000e(b).**

Commercial Office Products, id. at n.5 (emphasis added).

The United States dismisses this statement as dicta from a plurality. Further, it seeks to make a distinction between the administrative jurisdiction of the EEOC and the subject matter jurisdiction of the federal courts. The Government, however, offers no basis for such a distinction. Given the requirement that a potential Title VII plaintiff file with the EEOC before pursuing litigation, respondent cannot envision any reason why Congress would give the federal courts subject matter jurisdiction over businesses over which it had denied the EEOC jurisdiction.

Finally, in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), this Court gave a very clear indication of the significance of the numerosity requirement of §701(b). Rejecting the contention of the law firm which was the defendant in that matter that Title VII exempted partnership decisions from scrutiny, the Court observed that when "Congress wanted to grant an employer **complete immunity**, it expressly did so." *Id.* at 78 (emphasis added). The Court then noted that Congress had expressly exempted small businesses, i.e., those with less than 15 employees, from Title VII, thus granting such complete immunity. *Id.* at n.11.

As noted at the beginning of this discussion, respondent does not suggest that these four cases directly answered the question presented by petitioner. They do, however, powerfully suggest the answer to the question of a federal court's limited subject matter jurisdiction – as framed in *Aldinger*, i.e., did Congress intend to grant the federal court the type of jurisdiction at issue? Given *Hishon's* description of the numerosity requirement as complete immunity, *Walters* and *Aramco's* discussion of employers being "covered" or "subject to" Title VII based

upon §701(b) and *Commercial Office Products'* declaration that the EEOC lacks jurisdiction over small employers, the answer is plainly no.

III. THIS COURT'S DECISIONS DO NOT SUPPORT THE FORMALISTIC APPROACH TO JURISDICTION URGED BY PETITIONER.

Petitioner relies primarily on five decisions of this Court to bolster her formalistic analysis of the jurisdictional requirements of Title VII. Two of these decisions, *Bell v. Hood*, 327 U.S. 678 (1946) and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), do not involve Title VII while the other three, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), *General Electric v. Gilbert*, 429 U.S. 125 (1976) and *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), involve provisions of Title VII unrelated to §701(b)'s numerosity requirement. All are clearly distinguishable from the issue presented herein.

In *Bell*, the petitioners had instituted an action for monetary damages against agents of the Federal Bureau of Investigation contending that their rights under the Fourth and Fifth Amendments had been violated. Defendants sought and obtained dismissal for lack of subject matter jurisdiction contending that 1) petitioners were seeking damages for the state tort of trespass and not under the Constitution and 2) the district court lacked jurisdiction since the Constitution does not expressly provide for recovery of money damages for the violation of the Fourth and Fifth Amendments. On its review, this Court determined that petitioners' complaint clearly sought recovery under the Constitution, thus disposing of defendants' first argument. It was as to the second argument that

this Court held that the possibility that plaintiff might not have a cause of action upon which they might recover does not in itself defeat subject matter jurisdiction as the action still arose under the Constitution or laws of the United States. The Court concluded that it was only where "the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous" that the case may be dismissed for want of jurisdiction.[6] *Id.* at 682-683.

In *Bell*, there was no dispute that the petitioners were entitled to the protection of the Fourth and Fifth Amendments and that the FBI agents were subject to the limitations on government action imposed by these amendments. Petitioner herein seeks to protect rights of solely statutory creation. As such, Congress, in creating such rights, was free to limit both the scope of such rights and the jurisdiction of the federal courts relative to such rights. Given this Court's statement in *Hishon* that Congress had granted complete immunity from Title VII to small businesses, Congress clearly exercised that freedom to limit the scope of Title VII rights and limitations. Unlike *Bell* where the FBI agents were subject to the Fourth and Fifth Amendments

---

[6] Petitioner has observed that Respondent has never contended that the Title VII claim in this matter is so patently groundless as to provide no basis for federal jurisdiction, Arbaugh Br. 11-12, while the United States boldly asserts that petitioner's "Title VII claim is by no means immaterial or frivolous." U.S. Br. 6. As to petitioner's observation, Respondent notes that it has never needed to so label petitioner's Title VII claim given the Fifth Circuit's holdings relative to the jurisdictional nature of §701(b). As to the United States' assertion, respondent would respectfully suggest that it is at least arguable that a Title VII action brought against a small business expressly excluded from the coverage of the Act is frivolous.

and the issue was whether a monetary remedy was available for alleged violations of those amendments, respondent herein and all sub-fifteen employee businesses like it are simply not subject to Title VII in any way.

Steel Co. is distinguishable from the issue presented by §701(b) for much the same reason as *Bell*. Petitioner and the United States rely upon that portion of *Steel Co.* which addressed the issue of whether the absence of a private right of action for purely past violations of the Emergency Planning and Community Right-to-Know Act of 1986 (EPRCA), 42 U.S.C. §11046(a)(1) deprived the district court of subject matter jurisdiction. Relying largely on *Bell*, this Court observed that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction" *Steel Co.*, *id.* at 89. Further, the Court found it "unreasonable to read [EPRCA's jurisdictional provision] as making all the elements of the cause of action . . . jurisdictional." *Id.* at 90.

Like the FBI agents in *Bell*, there was no question that the defendant in *Steel Co.* was subject to the provision of the federal law invoked by the plaintiff. That defendant was undisputably subject to the provisions of EPRCA and the only issue was whether it could be held liable under that act for certain allegedly proscribed conduct. Relative to §701(b), on the other hand, there is no question that a business which employs fewer than fifteen employees cannot be liable under Title VII because Title VII proscribes nothing for those businesses. Where plaintiffs in *Steel Co.* won "under one construction of EPRCA and [lost] under another" *id.* at 89, a plaintiff who sues a business which employs fewer than fifteen employees cannot win under any construction of Title VII.

Petitioner and the United States analogize §701(b) to §706(e) of Title VII, 42 U.S.C. §2000e-5(e), which establishes the time limit for filing a charge with the EEOC and which this Court concluded was not jurisdictional in *Zipes*. Petitioner and the United States rely on this Court's observation in *Zipes* that §706(e) does not speak in jurisdictional terms and was separate from the jurisdictional provision contained in §706(f)(3). Such reliance, however, ignores the full reasoning of this Court in reaching its conclusion as to the non-jurisdictional nature of §706(e). As the Court noted at the beginning of its discussion of the issue, its conclusion was based upon the structure of Title VII, the congressional policy underlying and the reasoning of prior cases. *Id.* at 393. Examining the legislative history, the Court labeled the legislative history as "sparse" but observed that the filing provision had been characterized as a "period of limitation" and "time limitation" with a purpose of preventing the pressing of "stale" claims. *Id.* at 394. In reviewing prior cases which involved the filing requirement, the Court stated that while there were scattered references to the requirement as jurisdictional, more frequently the Court referred to the provision as a limitation statute and more importantly had treated it as such.

In contrast to *Zipes*, as the United States acknowledges in its amicus brief, the legislative history of §701(b) contains references to the provision as jurisdictional. U.S. Br. n.6. Neither petitioner nor the United States cite any legislative history where §701(b) is referred to as simply another element of the merits of a Title VII claim. Furthermore, as discussed above, this Court has consistently both referred to and treated the numerosity requirement

of §701(b) as a matter impacting subject matter jurisdiction.

General Electric and *Espinoza*, the final two decisions of this Court which petitioner cites to bolster her formalistic approach to the jurisdictional requirements of Title VII actually demonstrate the difference between matters which merely go to the merits of a given Title VII claim and §701(b) which concerns the very reach of Title VII. In *General Electric*, this Court held the defendant company did not violate Title VII by offering a health care plan which excluded pregnancy from its coverage. In *Espinoza*, this Court held that the defendant company did not violate Title VII by refusing to employ individuals who were not citizens of the United States. Unlike the situation herein, there was no question in either *General Electric* or *Espinoza* that the defendant companies were subject to the provisions of Title VII. Instead, the question in both cases was whether the actions of the General Electric Company and Farah Manufacturing violated federal law, by unlawfully discriminating.

Petitioner correctly states: "Whether the actions of a defendant actually violated federal law . . . goes to the very essence of the merits of a case." Arbaugh Br. 15. Is it a violation of federal law to refuse to cover pregnancy under a company heath plan is a question for the merits. Is it a violation of federal law to refuse to hire non-citizens is a question for the merits. Since it is clearly not a violation of federal law to employ either more than or fewer than fifteen employees, the question presented by §701(b) cannot go to the very essence of the merits of a case. Neither *Steel Co.* nor *Zipes* change this fact.

IV. A JURISDICTIONAL APPROACH TO THE NUMEROSITY REQUIREMENT OF §701(b) WOULD NOT BE INCONSISTENT WITH THE EFFECTIVE ADMINISTRATION OF TITLE VII.

Petitioner and the United States make a number of policy arguments to suggest that a jurisdictional view of §701(b) would substantially interfere with administration of Title VII. An examination of each of these arguments reveals that they are based upon both faulty assumptions and reasoning. Furthermore, petitioner's analysis ignore the very real difficulties which would arise if the numerosity requirement were treated as just another element of a Title VII claim. Respondent will address petitioner's policy arguments in the order in which they appear in petitioner's brief.

Although it does not appear in the policy section of petitioner's brief, Arbaugh's first "policy" argument is that treating the employee numerosity requirement as jurisdictional "would raise problems under the 1991 Civil Rights Act, which established a right to jury trials in any Title VII case in which a plaintiff . . . sought compensatory or punitive damages for intentional discrimination." Arbaugh Br. 24. According to petitioner, "[r]eferring to a judge factual disputes regarding the employee-numerosity requirement would derogate the statutory right to a jury trial in a manner Congress is unlikely to have foreseen or intended." *Id.* Petitioner's contention concerning Congressional foresight and intent simply ignores historical reality. When Congress enacted the 1991 Civil Rights Act, seven circuit courts had determined the employee-numerosity requirement to be

jurisdictional[7] with only one favoring a merits based approach.[8] Given this fairly uniform state of the law in 1991, it strains credibility to suggest that Congress would not have foreseen that judges would be deciding factual disputes regarding the employee-numerosity requirement so that they could then ascertain whether they had subject matter jurisdiction. As for Congressional intent, surely if Congress was dissatisfied with a jurisdictional approach to the numerosity issue, it could have rectified the situation through clarification of Title VII.

It is revealing to note that in addition to not modifying the employee-numerosity requirement for Title VII in the 1991 Civil Rights Act, Congress created employee-numerosity requirements patterned after §701(b) in the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 *et seq.* (ADA) and the Family Medical Leave Act of 1993, 29 U.S.C. §2611(4) (FMLA). Given the circuit court's almost uniform view of §701(b) as jurisdictional, it is only reasonable to conclude that Congress intended the employee-numerosity requirements in the ADA and FMLA to be jurisdictional. To now treat §701(b) as a matter for the

---

[7] The First Circuit in *Thurbar v. Jack Reilly's, Inc.*, 717 F.2d 633, 635 (1st Cir. 1983), the Fifth Circuit in *Dumas v. Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980), the Sixth Circuit in *Hassel v. Harmon Foods, Inc.*, 454 F.2d 199 (6th Cir. 1972), and *Armbruster v. Quinn*, 411 F.3d 1332, 1334 (6th Cir. 1983), the Seventh Circuit in *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 350 (7th Cir. 1983), the Ninth Circuit in *Childs v. Local 18, International Brotherhood of Electrical Workers*, 719 F.2d 1379 (9th Cir. 1983), the Tenth Circuit in *Owens v. Rush*, 636 F.2d 283, 285-86 (10th Cir. 1980) and the Eleventh Circuit in *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 932 (11th Cir. 1987).

[8] *Martin v. United Way of Erie County*, 829 F.2d 445, 447 (3rd Cir. 1987).

merits as petitioner suggests would create an anomalous situation whereby the employee-numerosity requirements in the ADA and FMLA, based on §701(b), would be jurisdictional while the source law would not be.

Petitioner's next policy argument, that "[i]f the employee-numerosity requirement in section 701(b) itself imposes a limitation on subject matter jurisdiction, that limitation . . . would be applicable to Title VII claims brought in state as well as federal court is simply wrong. Petitioner offers no support for this conclusion and it is well established principle that while state courts are courts of general jurisdiction, federal courts are courts of limited jurisdiction marked out by Congress. *Aldinger v. Howard*, 427 U.S. 1, 15 (1976). Petitioner offers no explanation as to how Congressional intent to mark out the limited jurisdiction of federal courts (as respondent suggests Congress has done in §701(b)) demonstrates an intent to proscribe the general jurisdiction of state courts.

Petitioner's first designated policy argument is that litigation of the employee-numerosity requirement frequently turns on complex factual determination, which petitioner suggest should be left to a jury rather than the trial judge. Similarly, petitioner maintains that the numerosity issue will involve "considerable discovery" which should be conducted at the same time as discovery on the merits. An examination of the actual requirements for a numerosity determination actually reveals why this matter is better left in the hands of the trial judge.

Petitioner begins by observing that §701(b) requires a review of employment records for two calendar years. This is clearly true but petitioner offers no explanation as to why it is more desirable to have these records examined by

six to seven lay jurors as opposed to one trial judge. Regardless of whether numerosity is a question of jurisdiction or the merits, any actual dispute that a business employs fifteen or more employees will have to be resolved, starting with someone reviewing the company payroll records. Respondent suggests that one person (a trial judge) can do this far more expeditiously than six to seven individuals sitting on a jury.

Likewise, the analysis required to resolve employee/independent contractor disputes is better suited to a judge than a jury. In this case, the district court considered factors enunciated by the Fifth Circuit to be used for the determination of whether an individual was an employee or independent contractor, citing *Cole v. Venture Transport, Inc.*, 2000 WL 335743 (E.D.La. 2000). In *Cole*, the court articulated the Fifth Circuit's standard:

> The Fifth Circuit has consistently held that the most important factor in this inquiry – although not alone determinative – is whether the "employer" controlled the individual's conduct, that is, "the means and manner of the worker's performance." *Bloom v. Bexar County, Texas*, 130 F.3d 722, 726 (5th Cir. 1997), *internal quotation marks omitted, citing Mares*, 777 F.2d at 1067; *see also Broussard*, 789 F.2d at 1160. The factors pertinent to this inquiry are: (1) ownership of the equipment necessary to perform the job; (2) responsibility for costs associated with operating that equipment and for license fees and taxes; (3) responsibility for obtaining insurance; (4) responsibility for maintenance and operating supplies; (5) ability to influence profits; (6) length of job commitment; (7) forms of payment; and (8) directions on schedules and performing work. *See Broussard*, 789 F.2d at 1160.

> Additional relevant factors include: (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (4) whether annual leave is afforded; (5) whether the work is an integral part of the business of the "employer"; (6) whether the worker accumulates retirement benefits; (7) whether the "employer" pays social security taxes; and (8) the parties' intention.

Cole, supra. The complexity of these factors lies not in answering the individual questions – the business either pays social security taxes or it does not, the worker either accumulates leave and retirement benefits or he does not. Indeed the district court herein found that many of the factors were undisputed. (App. 32-37). Rather, the complexity lies in balancing the factors which point in differing directions to make the appropriate determination under the "**applicable legal standards**." Arbaugh Br. 27. This is the job for a judge, not a jury.

Curiously, petitioner notes that in *Doe v. Goldstein's Deli*, 82 Fed.Appx. 773 (3rd Cir. 2003), litigation involving employee numerosity resulted in a four day evidentiary hearing with fourteen witnesses. Respondent submits that this example demonstrates the benefit of a judicial, as opposed to jury, determination of the numerosity issue. It is inconceivable that a hearing before a jury would have involved either less witnesses or proceeded more quickly. Under petitioner's merits based view of numerosity, *Doe's* jury would have had to listen to at least four days of

testimony completely unrelated to the main issue of a Title VII action, i.e., whether there was unlawful discrimination.

As to petitioner's contention that the resolution of the numerosity issue will normally involve considerable discovery, petitioner drastically overstates the discovery conducted in this case. While it is true that slightly less than five months passed between the filing of the Motion to Dismiss for Lack of Subject Matter Jurisdiction and the district court's ruling on the motion, petitioner's statement that "five months of discovery, analysis and briefing were required before the district court could reach a decision", Arbaugh Br. 31, is misleading. The district court issued an order on December 26, 2002 allowing petitioner until February 7, 2003 to conduct any discovery on the numerosity issue. Respondent was ordered to respond to this discovery within five working days. (App. 48). Counsel for petitioner took one deposition (App. 25) and requested documents from Y & H. Respondent engaged in no discovery. Furthermore. the court did not order additional discovery as suggested by petitioner, Arbaugh Br. 5, but instead ordered the parties simply to submit additional evidence as to the compensation paid to the owners. (App. 25).

Respondent submits that the limited discovery conducted herein is typical of the discovery necessary to resolve the numerosity issue. The businesses who would invoke the benefits of §701(b) are naturally small businesses. Absent a desire to run a meter on a fee generating case, any Title VII plaintiff attorney should be able to learn everything they need to know about the number of employees of such a business in short order.

Petitioner next asserts that if numerosity is jurisdictional, the trial court is obligated to inquire into the issue to assure its jurisdiction. Apparently, petitioner believes this imposes some great burden on the trial court. In fact, however, there would be no reason for any great burden. If this Court definitively declares numerosity to be a matter of jurisdiction, a trial judge could simply require the defendant company at the initial scheduling conference for the case to affirmatively declare how many employees it had for the relevant years. The district court and the plaintiff would then know at the beginning of the litigation whether jurisdiction under §701(b) needed to be resolved.

Petitioner also asserts that the jurisdictional nature of the numerosity requirement would require the district court to resolve jurisdiction even if the merits were more easily resolved. Although petitioner does not plainly state it, the only merits issues which respondent can foresee which would "more easily" resolve the case would be those leading to the dismissal of a plaintiff's case. That being the case, this potential problem is actually little more than an intellectual exercise. If it were demonstrated to a plaintiff (or more realistically to plaintiff's counsel) that their Title VII action was going to be dismissed on the merits – for example for failing to file an administrative charge within the applicable deadline – one must wonder why that plaintiff would bother to contest an absence of subject matter jurisdiction.

Petitioner further speculates that a Title VII defendant may intentionally defer challenging subject matter jurisdiction under §701(b) in order to gain a tactical advantage. Under petitioner's proposed strategy, a defendant company could get two bites at the apple by trying to win in the federal court on the merits with subject matter

jurisdiction only being raised after trial if it lost. The great flaw in this speculation is that it assumes that only defense attorneys can be Machiavellian. What defense attorney is going to undertake the scheme suggested by petitioner without considering the fact that the law allows the plaintiff to raise lack of subject matter jurisdiction after trial? A defense attorney who puts his small business client through the time and expense of a federal trial, achieves victory at that trial and then has to tell his client that the victory did not mean anything because the court lacked jurisdiction and they will have to try a second case in state court will have only one opportunity to try petitioner's scheme. After that, it is doubtful said attorney will be representing many small businesses in Title VII actions.

Arbaugh also claims that treating numerosity as a jurisdictional requirement would "create additional problems" where a plaintiff files supplemental state law claims along side a Title VII claim. Where the numerosity issue is not raised until after trial, a jurisdictional dismissal would require any verdict on the state law claims be set aside, as well, whereas a merits dismissal would permit the state-law judgment to stand. Arbaugh Br. 37. But this argument assumes that numerosity often will not arise until after trial, a dubious assumption at best. As explained above, small-employer defendants have absolutely no incentive to delay intentionally in filing numerosity-based motions to dismiss; the sooner, the better, as far as such businesses are concerned. And in the wake of a definitive ruling from this Court that numerosity is indeed a jurisdictional defense, inadvertent failures to raise the issue at the outset will be even fewer and farther between than they are now.

Arbaugh also says that even where a case is dismissed on numerosity grounds before trial, the nature of the dismissal could decide the fate of supplemental claims. If jurisdictional, the federal court would have to dismiss the state claims as well and would presumably lose the benefit of any completed discovery. (Again, this argument assumes that the numerosity issue is not raised at the very outset of the proceeding, which it almost certainly would be following a definitive ruling from this Court.) By contrast, Arbaugh says, were the dismissal on the merits, the district court would "retain jurisdiction to resolve the state law claim[s]." Arbaugh Br. 38. But this Court has emphasized that because "[n]eedless decisions of state law should be avoided," *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), "in the usual case in which all federal-law claims are eliminated before trial" – whether on jurisdictional grounds or the merits – "the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims," *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988). The point is that, in the real world, the fate of state supplemental claims is not likely to turn on the characterization of the numerosity-based dismissal as jurisdictional or on the merits; in either case, the state-law claims will probably be dismissed.

A jurisdictional approach to the numerosity requirement has functioned for decades in various circuits without creating the disruption which is the subject of petitioner's speculation.[9] A merits-based approach, on the

[9] The Fifth Circuit has held the numerosity requirement is a jurisdictional one for 25 years, *Dumas v. Town of Mount Vernon*, 612

(Continued on following page)

other hand, would significantly undermine the complete immunity which §701(b) is designed to grant to small businesses. *See Hishon*. As Judge Posner speaking for the Seventh Circuit recognized, the purpose of the exemption of small businesses contained in §701(b) is "to spare very small firms from the potentially crushing expense of mastering the intricacies of antidiscrimination laws, establishing the procedure to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Industries*, 166 F.3d 937, 940 (7th Cir. 1999). Judge Posner's discussion is in complete accord with this Court's analysis of immunity in *Siegert v. Gilley*, 500 U.S. 226, 232-233 (1991), where this Court held:

> One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit. In *Mitchell v. Forsyth, supra*, we said:
>
> > *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case

F.2d 974 (5th Cir. 1980), the Sixth Circuit has so held for 33 years, *Hassel v. Harmon Foods, Inc.*, 454 F.2d 199 (6th Cir. 1972), and the Ninth Circuit for 22 years, *Childs v. Local 18, International Brotherhood of Electrical Workers*, 719 F.2d 1379 (9th Cir. 1983).

> is erroneously permitted to go to trial. 472 U.S 511 at 526, 105 S.Ct. 2806, 86 L.Ed.2d 411.

Given the ease with which questions of fact could be created concerning the number of employees a small business had for the relevant periods, thereby forcing small businesses to trial, a merits-based approach would effectively destroy the immunity which Congress created in §701(b).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

BRETT J. PRENDERGAST
Attorney of Record for Respondent
Suite 1641
FNBC Building
210 Baronne Street
New Orleans, Louisiana 70112
Telephone: (504) 593-9277

Supreme Court, U.S.
FILED
NOV 30 2005
OFFICE OF THE CLERK

No. 04-944

In The Supreme Court of the United States

JENIFER ARBAUGH,

Petitioner,

v.

Y & H CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

JEFFREY A. SCHWARTZ
Counsel of Record
WATKINS LUDLAM WINTER
& STENNIS, P.A.
650 Poydras Street, Suite 1020
New Orleans, LA 70130
Phone: (504) 522-8788
Fax: (504) 522-8865

ERIC SCHNAPPER
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
Phone: (206) 616-3167

Counsel for Petitioner
Jenifer Arbaugh

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. INTRODUCTION	1
II. THE STATUTORY PROVISIONS WHICH LIMIT THE ENTITIES, PLAINTIFFS AND CLAIMS COVERED BY TITLE VII DO NOT RESTRICT THE SUBJECT MATTER JURISDICTION OF THE FEDERAL COURTS	3
III. THE DECISIONS OF THIS COURT DO NOT HOLD THAT THE TITLE VII EMPLOYEE-NUMEROSITY REQUIREMENT IS JURISDICTIONAL	8
IV. NO COMPELLING CIRCUMSTANCES WARRANT DISREGARDING THE PLAIN TEXT OF SECTIONS 1331 AND 706(f)(3)	17
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES:

Eberhart v. United States, 126 S.Ct. 403 (2005) 9, 10

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) 10, 11

EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988) 12, 15, 20

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) 9

Kontrick v. Ryan, 540 U.S. 443 (2004) 9, 10

Lauritzen v. Larsen, 345 U.S. 571 (1953) 5

Louie v. United States, 254 U.S. 548 (1921) 4, 5

McCulloch v. Socieded Nacional de Marineros de Honduras, 372 U.S. 10 (1963) 14

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 19

Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 14

Steel Co. v. Citizens for A Better Environment, 523 U.S. 83 (1998) 9, 10, 17

Steele v. Bulova Watch Co., 344 U.S. 280 (1952) 10

Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202 (1998) 14

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

14 U.S.C. § 89(a) 10

19 U.S.C. § 1701 10

28 U.S.C. § 1331 ..... *passim*

29 U.S.C. § 101 1

29 U.S.C. § 252(d) 2

42 U.S.C. § 405(h) 1

42 U.S.C. § 12102(2) 7

42 U.S.C. § 12112(a) 7

42 U.S.C. § 12117(a) 7

42 U.S.C. § 2000e(f) 6

42 U.S.C. § 2000e(k) 6

42 U.S.C. § 2000e(b)(1) 6

42 U.S.C. § 2000e(b)(2) 6

42 U.S.C. § 2000e(h) 6

42 U.S.C. § 2000e-1(a) 6

42 U.S.C. § 2000e-1(b) 6

42 U.S.C. § 2000e-1(c)(2) 6

42 U.S.C. § 2000e-2(e)(1) 6

42 U.S.C. § 2000e-2(e)(2) 6

42 U.S.C. § 2000e-2(g) 7

42 U.S.C. § 2000e-2(h) 7

42 U.S.C. § 2000e-2(i) 6

42 U.S.C. § 2000e-5(f)(1) 1

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 2000e-8(c) 13

42 U.S.C. § 12111(8) 7

49 U.S.C. § 10709 1

OTHER AUTHORITIES:

EEOC Compliance Manual § 605 (2000) 13, 16

EEOC Compliance Manual § 2 (2005) 16

Federal Rule of Criminal Procedure 33(a) 9, 10

Federal Rule of Civil Procedure 12(b)(1) 18

Federal Rule of Civil Procedure 56 ..... 17, 18

H.R.Rep. 92-238 20

Policy Guidance: Whether Part-Time Employees are Employees Within the Meaning of § 701(b) of Title VII and § 11(b) of the ADEA, 1990 WL 1104704 (1990) 15

ARGUMENT

I. INTRODUCTION

This case is controlled by the plain language of section 1331 of the Judicial Code and of section 706(f)(3) of Title VII.

The instant lawsuit presents a classic example of section 1331 federal question jurisdiction. The complaint asserts that there has been a violation of federal law (Title VII), and there is a federal cause of action to enforce the prohibitions of Title VII. 42 U.S.C. § 2000e-5(f)(1). Thus this case is a "civil actio[n] arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331.

Section 1331 is entirely sufficient to establish federal jurisdiction over the instant case unless the jurisdictional grant in section 1331 has been limited by some other provision of federal law. When Congress has wanted to restrict the general grant of federal question jurisdiction in section 1331, it has done so expressly. For example, 42 U.S.C. § 405(h) specifically bars the exercise of jurisdiction under section 1331 over certain claims under the Social Security Act.[1] Some sixty federal statutes more broadly forbid in specified instances the exercise of *any* federal jurisdiction that would otherwise exist under section 1331 or other jurisdictional provisions.[2] See, e.g., 29 U.S.C

---

[1] "No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 . . . of title 28 to recover any claim arising under this subchapter."

Another example of a limitation of jurisdiction under section 1331 is to be found in 49 U.S.C. § 10709.

[2] We set forth a list of those statutes in an appendix to this brief.

§ 101 ("No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute. . . . ").[3]

The expressly jurisdictional provision in Title VII, section 706(f)(3), in no way restricts the jurisdictional grant in section 1331. To the contrary, the terms of section 706(f)(3), creating federal jurisdiction over actions "brought under" Title VII, are as broad as those of section 1331, which encompasses actions "arising under" Title VII. As the government explains, section 706(f)(3) was included in Title VII to *broaden* the jurisdiction of federal courts by removing the $10,000 jurisdictional amount requirement that was contained in section 1331 in 1964. (United States Br. 13).

This statutory language is dispositive. Respondent's brief contains no reference to sections 1331 and 706(f)(3) other than a single sentence objecting that reliance on the actual text of these applicable statutes would be unduly "formalistic." (R. Br. 6). In order to prevail, respondent must overcome the clear language of sections 1331 and 706(f)(3) by demonstrating *both* that Title VII repealed by implication part of the general grant of federal question jurisdiction that was already contained in section 1331, *and* that some non-jurisdictional provision in Title VII tacitly overrides the broad and unambiguous grant of

---

[3] 29 U.S.C. § 252(d) provides that federal courts may not exercise jurisdiction over wage claims under the Fair Labor Standards Act, the Davis-Bacon Act or Walsh-Healey Act unless the work was done under a contract or pursuant to established local practice. The requirement expressly made jurisdictional by section 252(d) would normally be simply an element of the merits of a wage claim.

jurisdiction in section 706(f)(3). This Court's jurisprudence strongly disfavors repeals by implication and efforts to disregard the plain language of statutory text. Respondent's arguments fall far short of making the extraordinarily compelling showing that would be needed to overcome the express jurisdictional provisions of sections 1331 and 706(f)(3).

II. THE STATUTORY PROVISIONS WHICH LIMIT THE ENTITIES, PLAINTIFFS AND CLAIMS COVERED BY TITLE VII DO NOT RESTRICT THE SUBJECT MATTER JURISDICTION OF THE FEDERAL COURTS

Respondent contends that certain elements of a Title VII claim are inherently jurisdictional in nature. According to respondent, those elements include (a) restrictions on which entities are "subject to Title VII" (R. Br. 16), (b) limitations on which potential plaintiffs are "entitled to the protection" of the law (R. Br. 15), and (c) other elements which concern "the very reach" (R. Br. 18) or "the very scope of coverage" (R. Br. 5) of Title VII. The mere inclusion of such coverage limitations in Title VII, respondent suggests, implicitly narrowed the express and broad grant of jurisdiction in section 706(f)(3) and repealed by implication the otherwise applicable grant of jurisdiction in section 1331.

This contention is entirely insufficient to overcome the actual terms of section 706(f)(3) and section 1331. Respondent asks this Court to read section 706(f)(3) as if it restricted federal jurisdiction to "actions brought under this title *against an employer*," "actions brought under this title *by an employee*," or "actions brought under *and within the scope of coverage* of this title." Respondent offers a

variety of arguments as to why these proposed limitations on section 706(f)(3) would further the purposes of Title VII. The conclusive answer to these contentions is a simple one; Congress emphatically did not include any such restrictive language in the actual provisions of section 706(f)(3). The absence of such restrictions in the terms of section 706(f)(3) is all the more telling because Congress has chosen to include limitations of this sort in other statutes. (Pet. Br. 19-22). Its failure to do so here is dispositive.

Federal statutes frequently contain definitions of (and thus limitations on) the persons or entities to which those laws apply. But whether the commands of a statute cover a particular defendant is assuredly a different question than whether a federal court has subject matter jurisdiction to decide the merits of a claim against that defendant. This Court has repeatedly held that federal courts have jurisdiction over actions against defendants which assert, and may ultimately be able to establish, that they are not "subject to" the statute in question.

In *Louie v. United States*, 254 U.S. 548 (1921), the defendant had been indicted for murder under a statute which applied only to individuals who committed crimes on Indian reservations. The defendant asserted that the crime with which he had been charged had not occurred on a reservation, and that he therefore "was with respect to the acts complained of *subject to* the laws of the state of Idaho and not to the laws of the United States." 254 U.S. at 550 (emphasis added); see R. Br. 16 (respondent assertedly not "subject to" Title VII). The court of appeals in *Louie* had held that such a contention concerned the subject matter jurisdiction of the district court, and for

that reason could be reviewed on appeal only by a writ of error to this Court. 254 U.S. at 549. This Court reversed:

> Since defendant's motions in the District Court did not raise a question properly of the jurisdiction of the court, but went to the merits, there was no basis for a direct writ of error from this court.

254 U.S. at 551.

In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), the defendant ship owner in a Jones Act case contended, and this Court agreed, that the ship owner was not covered by that statute because the Jones Act "would not *reach* a [ship owner or its agent] performing the proscribed acts aboard the ship of a foreign state on the high seas." 345 U.S. at 578 (emphasis added); see R. Br. 18 (defendant assertedly outside "the very reach" of Title VII). But while holding that the Jones Act did not apply to the defendant, this Court emphatically rejected the defendant's suggestion that the absence of such coverage meant the federal courts had no subject matter jurisdiction over the claim.

> The question of jurisdiction is shortly answered. . . . As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact.

345 U.S. at 574-75.

If, as respondent suggests, the limitations on the coverage of a statute are now to be read to restrict the broad language of express jurisdictional provisions such as

sections 1331 and 706(f)(3), a very large number of new subject matter jurisdiction issues would be created. Title VII itself, in addition to the fifteen-employee requirement, has ten other restrictions on which entities are "subject to" Title VII,[4] and five limitations on which potential plaintiffs are "entitled to the protection" of that statute.[5] Title VII also contains eight statutory provisions expressly placing certain discriminatory practices outside the prohibitions of the law;[6] any of these might fairly be

---

[4] A defendant would not be "subject to" Title VII if it were (1) the United States (42 U.S.C. § 2000e(b)(1)), (2) a corporation wholly owned by the government of the United States (*id.*), (3) an Indian tribe (*id.*), (4) a department or agency of the District of Columbia subject by statute to the procedures of the competitive service (*id.*), (5) a bona fide private membership club (42 U.S.C. § 2000e(b)(2)), (6) not in an industry affecting commerce (42 U.S.C. § 2000e(h)), (7) an employer with respect to the employment of aliens outside any state (42 U.S.C. 2000e-1(a)), (8) a religious organization with respect to the employment of individuals to perform work connected with the carrying on of its activities (*id.*), (9) a foreign person not controlled by an American employer (42 U.S.C. § 2000e-1(c)(2)), or (10) a business or enterprise on or near an Indian reservation with respect to certain publicly announced preferential practices (42 U.S.C. § 2000e-2(i)).

[5] A plaintiff is not subject to the protections of the act if he or she is (1) an independent contractor, rather than an employee or applicant for employment (see 42 U.S.C. § 2000e(f)), (2) a state or local elected official (*id.*), (3) on the personal staff of such an elected official (*id.*), (4) an appointee of such an official at the policy making level (*id.*), or (5) an appointee of such an official with respect to the exercise of constitutional or legal powers (*id.*).

[6] The practices expressly placed outside the coverage of Title VII include: (1) failure to pay for certain abortion related health benefits (42 U.S.C. § 2000e(k)), (2) actions taken outside the United States required by foreign law (42 U.S.C. § 2000e-1(b)), (3) discrimination on the basis of religion, sex or national origin that is a bona fide occupational qualification (42 U.S.C. § 2000e-2(e)(1)), (4) certain employment practices by schools connected with religious organizations or whose curriculum is directed to propagating a particular religion (42 U.S.C. § 2000e-2(e)(2)), (5) refusal to hire or employ individuals who fail to

(Continued on following page)

characterized as constituting limitations on "the very reach" of the law. On respondent's view, all of these provisions would restrict the subject matter jurisdiction of the federal courts. Rule 8(a)(1) would presumably require every Title VII plaintiff to allege, not merely that his or her claim arose under Title VII, but also that all of these other restrictions had been satisfied. If these statutory provisions were held to limit subject matter jurisdiction, any factual disputes bearing on their application would have to be resolved by the court rather than a jury.

If coverage restrictions were generally deemed to limit subject matter jurisdiction, a very large number of other statutes would be affected in addition to Title VII. Such a view of subject matter jurisdiction would have a substantial impact, for example, on the enforcement of the Americans With Disabilities Act. The ADA only covers discrimination against a "qualified individual with a disability." 42 U.S.C. § 12112(a). The statute spells out the definition of "disability" (42 U.S.C. § 12102(2)) and "qualified individual" (42 U.S.C. § 12111(8)). Disputes about whether a plaintiff had a disability, or was qualified, are often at the very heart of ADA cases, and raise complex factual disputes and fact-bound issues. The ADA expressly incorporates by reference the broad jurisdictional provision of section 706(f)(3) of Title VII. 42 U.S.C. § 12117(a). But if, despite the terms of section 706(f)(3), ADA coverage issues are now deemed to limit subject matter jurisdiction,

---

satisfy certain requirements imposed in the interest of national security (42 U.S.C. § 2000e-2(g)), (6) the utilization of a bona fide seniority system (42 U.S.C. § 2000e-2(h)), (7) the utilization of certain validated tests (*id.*), and (8) practices authorized by certain provisions of the Fair Labor Standards Act (*id.*).